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**The Virginia Criminal Sentencing Commission**
**April 19, 1999**
**Meeting Minutes**

**Members Present:**
Judge Gates, Judge Bach, Jo Ann Bruce, Peter Decker, Frank Ferguson, Judge Honts, Judge Hudson, Judge Johnston, Lane Kneedler, Judge McGlothlin, Reverend Ricketts, Judge Stewart and Bobby Vassar

**Members Absent:**
Mark Christie, William Petty, G. Steven Agee and Judge Newman

The meeting commenced at 10:05 a.m. and Judge Gates introduced Rich Savage, Director of the Crime Commission and thanked him for coming. He also introduced Dick Hall-Sizemore from the Department of Planning and Budget and thanked him for attending. Judge Gates then asked the Commission members to approve the minutes from the last meeting.

***Agenda***

**Approval of Minutes**

Approval of the minutes from the November 16, 1998 meeting was the first item on the agenda. The Commission unanimously approved the minutes. Ms. Bruce asked if the minutes should state why the total counts of votes kept going down throughout the meeting. Judge Gates felt that no reason was necessary since members leave the room from time to time. Mr. Ferguson felt that it was not necessary to state a reason since the Commission had a quorum during all times when votes were recorded.

The second item on the agenda was a report on the 1999 General Assembly Actions. Judge Gates asked Dr. Kern to discuss this item on the agenda.

**1999 General Assembly Actions**

Dr. Kern said the Commission was very successful this year with our recommendations to 1999 Session of the General Assembly. The Commission made twenty-four specific recommendations for revisions to the sentencing guidelines system, all but two of those recommendations were adopted by the General Assembly

Five recommendations made by the Commission required changes to the Code of Virginia. In these instances, legislation had to be drafted, introduced and adopted exclusively by the

General Assembly. Dr. Kern said he was going to review each one of these bills. The first bill he discussed was Senate Bill 853 that added crimes to the list of violent felony offenses for purposes of enhancements to the sentencing guidelines. Of the crimes that the Commission proposed for inclusion on this list only two were deleted by the House of Delegates. He then enumerated all the new crimes that were approved for inclusion as violent crimes and that will become effective on July 1, 1999. The two crimes that were deleted by the General Assembly for inclusion as violent crimes were simple assault against law enforcement, fire or rescue personnel and simple assault as a hate crime.

The next bill discussed was Senate Bill 927 that addressed changes in statutory references due to the recodification of Title 17. This was purely a housekeeping bill and was adopted without opposition. The next piece of legislation to be discussed was Senate Bill 904. This bill limited the good time credits available to a jail inmate serving a felony sentence or awaiting a felony disposition who works outside the jail to no more than 15% of the sentence. Currently a judge may allow a person convicted of a felony to work on state, county, city or town property, with the consent of the county, city or state agency or local public service authority involved, for such credit on his sentence as the judge may prescribe in his order. The net result of this provision is that, in some cases, felons are serving less than 85% of their felony sentences. The Commission felt that this Code section was overlooked during the abolition of parole. Dr, Kern remarked that this piece of legislation was introduced in identical form by a number of other senators and delegates. The Commission agreed that our bill be incorporated into Senate Bill 964 which was patroned by Senator Reynolds. This bill was passed and will become effective July 1, 1999. With the passage of this legislation, all felons in the State of Virginia will be required to serve 85% of their sentence.

The next bill discussed was Senate Joint Resolution 333, which requires the Sentencing Commission to develop a risk assessment instrument for utilization in the sentencing guidelines for sex offenses. Senator Howell introduced this resolution. The resolution instructs the Sentencing Commission to consider the impact of treatment interventions on the reductions of sex offenses. The Commission is also to complete its work in time to submit its findings and recommendations to the Governor and the 2000 Session of the General Assembly. Mr. Vassar inquired about the anticipated impact of this study (i.e., incapacitation or treatment?). Dr. Kern responded that the study could go both ways but he felt that the intent of the drafters of this resolution anticipated incapacitation as an end result. Dr. Kern noted that the idea for this resolution came from the General Assembly's discussion on civil commitment of sex offenders that goes into effect in 2001. That legislation states that once a sex offender convicted of certain sex crimes has served his criminal sentence, he will be considered for civil commitment and possibly be detained longer after his criminal sentence is served. Mr. Ferguson said that this study resolution came out of the work of a task force of the Crime Commission, on which he served, that had also recommended not to adopt civil commitment at this time. He observed that this resolution was viewed as a way to evaluate offenders at their initial sentencing rather than

after the incarceration period. It was hoped that this study could identify those offenders who could benefit from treatment and those who could not. Dr. Kern said this item would be discussed later on in the meeting.

Dr. Kern next discussed Senate Bill 905. This bill recommended that probation officers be the only group allowed to complete sentencing guidelines forms. Currently, prosecutors are allowed to complete the forms when a pre-sentence investigation report is waived. The Commission's audit study revealed that prosecutors have a high error rate when completing the criminal history section of the forms. This legislation sailed through the Senate unopposed but run into trouble in the House Courts of Justice Committee. An amendment was added that essentially allowed prosecutors to fill out the form if a pre-sentence investigation was waived. The current law already allows as much so Dr. Kern asked Senator Stolle, the Bill's patron, to strike the proposed legislation. The critics of the proposed legislation said that it would impede the process of moving plea agreement cases through the courts. These critics felt that courts would have to wait while a probation officer completed the forms and this would lead to delay in the courts. Dr. Kern did point out that some circuits complete pre-sentence investigations in every case but those models were not adequate to address their concerns. Mr. Kneedler asked if the Commonwealth's attorneys supported the Commission with regards to this bill. Dr. Kern said that they did formally support us but that during the House Courts of Justice subcommittee hearing that their support waivered. Dr. Kern felt that the Commonwealth attorney's may have been a bit defensive given the results of the audit. He reiterated that the problem centered on the inadequacy of the criminal record keeping system and not the professionalism of the Commonwealth's attorneys. Judge Johnston commented that the House of Delegates has a valid concern about backlog. Dr. Kern agreed that there is a legitimate concern

As an alternative to the legislation, Dr. Kern gave the Commission members a draft letter that could be sent to Circuit Court judges about this recommendation that was not acted upon by the General Assembly. He then read the proposed letter to the members. Since the proposed recommendation failed, he felt that the problem of not capturing prior juvenile and adult convictions for violent offenses would continue. The letter states that the Commission will hold training seminars on the topics of researching criminal records and offer these classes to commonwealth attorneys throughout the state to try to alleviate this problem. This training would parallel the training program on criminal history record research that is standard practice for probation officers. Dr. Kern said that in guilty plea cases where a pre-sentence investigation report is waived, the judge should take whatever measure he deems appropriate to satisfy himself that the Commonwealth attorney has completed a thorough review of the offender's prior record.

Mr. Kneedler commented that he did not have a problem with sending a letter to the judges. He felt that in the long run that the probation officers should complete all the forms. Judge Hudson questioned if training would help in this case if the problem really

was a lack of resources. Mr. Hudson suggested that police departments and sheriff offices should be encouraged to run an NCIC report on every felony case and attach it to the file. Dr. Kern agreed but also felt that some records are still missing dispositions and juvenile records on that system.

Judge Gates asked the judges on the Commission what they felt about the proposed letter. Judge McGlothlin commented that the letter could be read as an accusatory finger being pointed at the Commonwealth's attorneys. He felt that, if a letter was sent, that it should be changed to the passive voice. The Commission should add that Commonwealth's attorneys' forms contain more omissions due to the lack of resources or inadequate databases. The second page should also reflect that the judge should take whatever measures to satisfy him that the guidelines form contains all the accurate information. Judge. Hudson said that the Commonwealth's attorneys may get the perception that the Commission is blaming them and boycott all the training. Judge McGlothlin said that the problem is a resource issue. He asked if Dr. Kern got any response from the Department of Corrections on this issue. Dr. Kern responded that the Secretary of Public Safety and the Governor's Office supported this bill. Mr. Kneedler commented that the real problem is making sure the prior record is accurate. He felt that the Commission should work with the Commonwealth's attorneys and the police to try to find a solution to this problem. Judge Stewart said this whole problem would disappear if the state had good records. Judge Hudson said he may take this problem to the Criminal Justice Services Board in the future.

The last piece of legislation that Dr. Kern spoke of was Senate Bill 906. This bill clarified that there is no distinction between a felony sentence of one year and a felony sentence of twelve months, and required that offenders with sentences of twelve months or more are state-responsible prisoners and should be transferred to the Department of Corrections. The bill passed the Senate but run into a problem in House Courts of Justice Committee. Due to some confusion over a proposed amendment to the legislation that may have actually lead to more confusion on this issue, the bill was set aside for this year. Dr. Kern said that 12% of all sentences are 12 months or one year and that the legal distinction between the two sentences is only a problem for forecasting correctional bed spaces. He hoped to work on this issue with the Governor's Policy Committee on Prison and Jail Forecasting.

At this juncture, Judge Gates recognized Mr. Savage of the Crime Commission. Mr. Savage asked if he could comment on the previous matter that was discussed – the accuracy of criminal record. Mr. Savage reported that the Crime Commission has been concerned about the accuracy of the criminal record exchange (CCRE). The Crime Commission inserted language in the recently approved budget that requests the auditor of public accounts to audit the CCRE record information. The results of that audit report will be available in December 1, 1999. He said that Rob Baldwin, Executive Secretary of

the Supreme Court, will be involved in this process and he felt that Dr. Kern might want to participate in this group.

Dr. Kern continued his presentation by summarizing House Joint Resolution 688. This resolution requested the Department of Juvenile Justice to develop a standardized social history form for use by the court service units. The Commission is presently involved in a study on gathering data on juvenile sentencing and this resolution will aid in that regard. He then touched briefly on House Bill 2159 that amended legislation that would require drug screening and assessment and pre-sentence investigations on certain offenders. Pre-sentence investigation reports will be required only when the defendant pleads guilty without a plea agreement or is found guilty by a court after a plea of not guilty. If there is a trial a pre-sentence report must be completed. The next piece of legislation was Senate Bill 820, which provided that any persons convicted of certain firearm offenses shall be sentenced to a minimum term of imprisonment of five years, which shall not be suspended. These new mandatory minimums have been dubbed "project exile" and will result, in some cases, in conflicts with the sentences recommended by the guidelines.

Judge Gates thanked Dr. Kern for his presentation. He then asked Ms. Jones to discuss the next item on the agenda, Proposed Legislation and Impact Analysis.

**Proposed Legislation and Impact Analysis – 1999 General Assembly**

Ms. Jones began the presentation by reviewing the legislative mandate. The legislation in question, the so-called "Woodrum" statue," requires the Commission to estimate the impact of proposed legislation in terms of the possible increase in imprisonment costs. She said that procedure involves our analysts estimating the number of prison bed required by a proposed bill and then the Department of Planning and Budget (DPB) prepares impact statements reflecting the associated increased operating costs. DPB also uses input from the Department of Corrections and the Department of Juvenile Justice to arrive at their final impact statement with an estimated appropriation.

She continued by saying that the number of legislative impacts completed by our staff has dramatically increased in the last two years. In 1997, the Commission completed 83 impact statements and in the past year, completed 133.

Ms. Jones presented a chart that showed an overview of the impact process. Once the Commission receives the bill draft, the staff searches for similar proposals in the current or past year. This process is facilitated by the development of a database that tracks legislative impacts. Ms. Floyd developed and currently maintains this database system. In some cases a forecast is not developed and the staff tries to provide some relevant data. Once the impact is finalized a copy is send to DPB and the Clerk of the House of Delegates.

Ms. Jones then listed types of legislative proposals that require impact statements. Some of the types included a proposal to create a new crime, to increase a felony penalty, to raise a misdemeanor to a felony, to adopt mandatory penalties and increase a misdemeanor penalty. She briefly spoke about the Commission's changing role in this process. The staff had a couple of meetings with the Senate Finance and the House Appropriations Committees where the legislative impacts were discussed in detail. In a number of instances, the staff could not assess bed space impact due to the fact that misdemeanor crimes were involved and the data system did not support the type of detailed analysis required. Accordingly, the legislature approved an amendment directing jailers to use Virginia Crime Codes to describe offenses for which offenders are incarcerated. She also added that the Commission had somewhat of a consulting role in two major gubernatorial initiatives, which were Virginia Exile and Bail Reform.

Ms. Jones said that Virginia Exile initiative create mandatory penalties for certain firearm offenses. The Bail Reform changed denial basis from emphasis on prior offenses to instant or current offenses. Last summer, Dr. Creech from the staff was asked to calculate impacts on Virginia Exile and Bail Reform. Over the course of the next six months, there were approximately fifteen more permutations of this legislative proposal. She said ultimately the two proposals were merged into one bill and passed by the 1999 General Assembly Session.

At his juncture, Mr. Dick Hall-Sizemore, from the Department of Planning and Budget, thanked the staff for all their work during the session. He said that the staff did a wonderful job on these impact statements. Mr. Hall-Sizemore said the Commission went beyond the call of duty in preparing the analysis for the Project Exile Bill. He said that the analysis was crucial to the way the Governor packaged this bill. Judge Gates thanked him for his compliments to the staff's work.

Judge Gates thanked Ms. Jones for her presentation. He then asked Ms. Farrar-Owens to discuss the next item on the agenda, Sentencing Guidelines Compliance Report.

### Sentencing Guidelines Compliance Report

Ms. Farrar-Owens presented a series of charts to summarize the compliance rate patterns and trends. She explained that her oral presentation was condensed and a complete written compliance update was in the packets distributed to each member. The analysis in the packets included cases received in FY1999 through April 7, 1999. More than 67,000 cases have been sentenced under truth-in-sentencing laws. The Commission had so much data that the staff elected to analyze just FY1998 cases for our Annual Report. She said that because that data was covered in our report, she was going to present data from FY 1999 through April 7, 1999.

**Overall Sentencing Guidelines Compliance:** Ms. Farrar-Owens said that compliance is up from 74.7% in FY1998 to 77.2% so far in FY1999. This has happened, in part, because of the risk assessment instrument that is currently being pilot tested in Circuit 5 (Suffolk), Circuit 14 (Henrico), Circuit 19 (Fairfax), and Circuit 22 (Danville area). Pilot testing of the risk assessment began during FY1998, so about half the fiscal year included risk assessment cases from these jurisdictions. She explained that pilot testing has occurred throughout FY1999 to date. Risk assessment cases comprise 10% of all the cases we are receiving this year and this is nearly double the proportion of last year's total. Ms. Farrar-Owens reminded the members that under risk assessment, if an offender scores 9 points or less, the judge is given a dual recommendation of the traditional incarceration recommendation or an alternative sanction. If the judge does either one of those things, he is considered in compliance. Given this, she observed, we would expect our compliance rate to go up, and it has.

She said that mitigation and aggravation rates are still about evenly split. In FY1998, mitigation was slightly larger, and now it is the aggravated sentences that represent the slightly larger share.

**Dispositional Compliance:** Dispositional compliance has increased from 83% to 85%. She said in terms of departures, the aggravation rate has gained a little in comparison to FY1998.

**Compliance by Offense:** Ms. Farrar-Owens noted that because fraud, larceny and drug offenses are the offenses covered by the risk assessment instrument, compliance rates for these offense groups has gone up. Larceny has always had the highest compliance rate, but the compliance rate for Fraud has risen enough to put it in first place. She said that the compliance rate for drugs in particular has increased from 73.8% in FY1998 to 77.6% in FY1999. Because drugs is the most common offense group, this increase in drug compliance has really been the driver behind the increase in overall compliance. She commented that it is interesting to note that compared to FY1998, compliance rates for all the offense groups have gone up, although for some groups the increase is small. Also, no compliance rates have gone down. Compliance for rape and sexual assault cases has gone up a lot between FY1998 and FY1999 to date. She said that the compliance rate for rape has increased from 62% in FY1998 to 69% in FY1999. Ms. Farrar Owens looked at changes in compliance by specific Virginia Crime Code. Interestingly, the largest increases in compliance rates have been in rape and aggravated sex battery cases involving victims under age 13. The other offense that has experienced an increase in compliance is indecent liberties of a child by a custodian. The compliance rate went up 12% for this particular crime.

**Compliance by Circuit:** Ms. Farrar-Owens stated while there has been some minor fluctuations in these compliance rates, overall those circuits that have always had higher

than average compliance continue to do so and those with lower than average compliance have maintained that position. The circuit-specific compliance rates range from a high of 86% to a low of 63%. Of the four circuits in the risk assessment pilot project, 3 out of 4 are showing higher compliance rates. Of those non-risk assessment circuits with high compliance rates, Circuit 7 (Newport News) and Circuit 8 (Hampton) have compliance rates of 86% and 84% respectively. She also noted that seven circuits have compliance rates above 80% and eight circuits have rates below 70%. Sixteen circuits have compliance rates in the seventies.

**Midpoint Enhancements:** Next, Ms. Farrar-Owens discussed the compliance rates for cases that received midpoint enhancements. The rate at which midpoint enhancements are being applied has not changed and is still about 20%, but compliance rates for all but one of the types of midpoint enhancements have increased. The only compliance rate that dropped was that for cases with an Instant Offense and Category 2 enhancement. The biggest increase in compliance rates was attributed to cases with the enhancement for instant offense (compliance rate went from 60% to over 67%). Forcible rape, forcible sodomy, object penetration and aggravated sex battery all receive this type of midpoint enhancement due to the seriousness of the instant offense. For cases with victims under age 13, the compliance rate has gone up while mitigation rate has gone down. She then presented a chart that Mr. Petty had requested in an earlier meeting. The chart listed mitigating reasons for departure in midpoint enhancement cases.

**Reasons for Departure:** Ms. Farrar-Owens next presented information concerning the reasons judges cite when sentencing above or below the guidelines. For the time period FY1999 (through April 7, 1999), when judges have sentenced below the guidelines they cited alternative sanction in 24% of the cases. Alternative sanctions include boot camp incarceration, detention and diversion centers, or any community-based program. In 18% of the mitigation cases, judges noted the offender's potential for rehabilitation as a rationale for imposing a term below the guidelines. When judges sentenced above the guidelines, they cited the offender's criminal orientation in 15.9% of the upward departures. In 13% of the aggravation cases, judges noted plea agreement – a departure reason that is not very helpful to the Commission when the data is analyzed.

**Sentencing Guidelines Compliance in Jury Cases:** Of the 289 jury cases, jury sentences were within the guidelines 40.2% of the time. Juries imposed sentences higher than the guidelines in 45.3% of the cases and imposed sanctions lower than the guidelines 14.5% of the time. Ms. Farrar-Owens observed that judges modified only 23% of the jury sentences. She said that Mr. Petty or Mr. Kneedler asked about the use of the post-release term in jury cases. Post-release terms can be used by judges to impose and suspend up to an additional three years of incarceration which could be re-imposed should the offender violate community supervision. Judges have not used this option very often. They have used this option in less than 1% of the cases overall. She said that judges have used it in about 5% of jury cases so far this fiscal year.

**Drug Guidelines:** Ms. Farrar-Owens then focused on the modifications to the guidelines that took effect July 1, 1997. A significant change to the guidelines starting July 1 was the addition to the drug guidelines of a factor accounting for the quantity of cocaine involved in a sales offense. She said that the factor has two parts. First, the offender who sells less than one gram of cocaine and has no prior felony record ends up with a dual recommendation: either the traditional prison recommendation (usually 7 to 16 months) or detention center incarceration. The judge has the option to do either and be in compliance with the guidelines.

This dual recommendation will expand to include Boot Camp Incarceration on July 1, 1999. Ms. Farrar-Owens presented a chart that compared sentencing outcomes for these cases prior to the change and for the current fiscal year to date. The data revealed that more judges than ever are taking advantage of this recommendation for detention center. In FY 1998, judges used this sanctioning option in 15% of the cases, but in FY 1999 more than 24% have used it. She also observed that during this time period the proportion of these offenders receiving incarceration of 12 months or more has continued to drop. Ms. Bruce asked if the Department of Corrections could handle all these offenders being sentenced to alternative sanctions. Ms. Farrar-Owens said that the Department of Corrections (DOC) is handling the caseload to our knowledge. She knows that DOC has a waiting list in some areas in the state. Mr. Hall-Sizemore added that DOC is opening a new detention or diversion center and is currently converting two existing field units this summer.

The other part of the guidelines revisions dealing with cocaine centered on the larger quantity cases. For offenders who sell one ounce or more of cocaine, the recommendation is increased by three years, and for offenders who sell _ lb. or more, the recommendation is increased by 5 years. The guideline recommendations are enhanced for offenders selling the largest amounts of cocaine. Sixty offenders have received the new enhancement. In 13% of these cases, judges have opted for no incarceration or an alternative sanction. In 1.7% of these drug cases, the offender received incarceration of 12 months or less. Approximately 21.7% of these drug felons received incarceration of two years to four years. A shift to the use of harsher sanctions is clearly being achieved by the revisions to the guidelines in these cases.

**Habitual Traffic:** Ms. Farrar-Owens then spoke about the impact of changes in the habitual traffic offender statute. This modification which took effect in July 1, 1997 allows judges to suspend the 12-month mandatory minimum incarceration term and sentence offenders to Detention Center, Diversion Center or Boot Camp Incarceration in cases where the judge feels an alternative sanction is appropriate. Of the 765 habitual traffic cases sentenced in FY1998, only 13.7% have had the mandatory minimum sentence suspended and been sentenced to one of the alternative sanctions.

**Sex Offenses Against Children:** Recent guidelines revisions also added a factor to the sexual assault guidelines for crimes in which the victim was younger than 13 years old at the time of the offense. The addition of this factor increases the likelihood that offenders who commit sex crimes against the very young will be recommended for incarceration, particularly prison. Ms. Farrar-Owens continued by saying that we have received 128 sexual assault cases in FY1999 (through April 7, 1999) that involved victims younger than 13. In 12% of these cases, judges have opted for no incarceration or an alternative sanction. In 20% of these sexual assault cases, the offender received incarceration of 12 months or less. Approximately 22% of these sexual assault felons received incarceration of one year to two years.

Judge Gates thanked Ms. Farrar-Owens for her presentation. He then announced a ten-minute recess and a working lunch upon the member's approval. Judge Gates then asked Ms. Floyd and Ms. Jones to discuss the next item on the agenda, Offender Risk Assessment Project –Data Update.

### Offender Risk Assessment Project – Data Update

Ms. Floyd began by saying that the risk assessment pilot project has been in progress now for over a year. She reminded the Commission that risk assessment only applies to drug, fraud and larceny offenses within certain judicial circuits. For over a year, the pilot project has been underway in Circuit 5, 14 and 19 and in Circuit 22 for about one year. She said that she would be presenting information to the Commission based on cases received from December 1, 1997 to March 15, 1999. On March 15th, Norfolk and Newport News started using the risk assessment instrument. The cases from the two new pilot sites were not included in this analysis. However, the Commission has already received over 100 worksheets from these two sites combined. During the month of February, Mr. Fridley and Ms. Smith Mason conducted training in three locations for probation officers, Commonwealth's attorneys and defense attorneys in Newport News and Norfolk. Several Commonwealth's attorneys in Norfolk were unable to make the training sessions and have asked us to hold a special risk assessment training session. This training will be conducted on May 5th.

Ms. Floyd displayed a copy of the back cover of the risk assessment worksheet. She said that the staff has made a cosmetic change to the back of the cover sheet. More space was added to the Reason for Departure Section. Judges are giving reasons only half of the time in situations where they did not give an alternative sanction when one was recommended. She hoped that the extra space might encourage more feedback from the judges.

She said it has been about six months since the last time Ms. Jones presented information on the pilot project. The Commission has received 1,000 new cases to the risk assessment database. At the September, 1998, meeting we had received 1,576 worksheets and the cases received to date total 2,627.

Ms. Floyd reviewed how the risk assessment cases are filtered down to the group that is ultimately analyzed. Section D is not supposed to be filled out when an offender is recommended for probation. Also, there are some offenders who, although recommended for incarceration, are not eligible for risk assessment. These are offenders who have a violent prior record, violent additional offense, or who have a large cocaine amount at sentencing. The only cases analyzed are the ones that are eligible for risk assessment. She said that after the filtration of cases our staff analyzed 962 cases. The Commission has received 2,236 yellow risk assessment forms between December 1, 1997 and March 15, 1999. Most of these cases are coming from Henrico and Fairfax, with Henrico carrying _ of the cases and Fairfax close to half. Suffolk and Danville comprise the rest of the cases, accounting for about 30%. She noted that the Commission is still receiving a few risk assessment cases on the inappropriate forms (i.e., white forms) but that the number of these has been leveling off. Ms. Floyd then turned the presentation over to Ms. Jones to discuss the analysis part of the presentation.

Ms. Jones began by presenting a chart that showed the back of the cover sheet. She focused on the list of alternative programs that is not a comprehensive list of programs available. There are a few alternatives that are not as obvious as the ones listed. If a prison sentence is recommended and a jail sentence is received then that is counted as an alternative. If an offender is recommended for prison or jail, a probation term (supervised, unsupervised, indefinite, intensive and day reporting) is considered an alternative. She also added that work release and jail farm are considered as alternatives to traditional incarceration.

Ms. Jones continued by saying that of the 962 cases that were scored on risk assessment, 26% of the offenders were recommended for an alternative punishment. Among these cases, 36% received an alternative sanction while 64% were not sentenced to alternative punishment. The percentages are almost identical to those presented at the last meeting.

Ms. Jones next discussed several issues relating to alternative punishment and how the offender was sentenced. She said that that majority of offenders were not recommended for an alternative sanction. About 11% of the offenders that were recommended for an alternative did not receive that sanction. This included some offenders recommended for a short jail term that did not volunteer for a program like detention center because this would take them out of their community and may result in a longer sentence.

The rest of the analysis dealt with individual circuits. Ms. Jones displayed data that compared offenders who received an alternative with their risk assessment. Circuit 19

(Fairfax) was the only jurisdiction where the majority of offenders placed in an alternative had actually been recommended for such a sanction. In the other pilot jurisdictions, offenders deemed to be poor risks but still placed in alternative punishment programs actually outnumbered the good risk felons placed in alternatives.

She then discussed alternatives used by each circuit. Circuit 5 (Suffolk, Southampton, and Isle of Wight) was the first jurisdiction discussed. Unlike the other analysis, there is a clear pattern here. This circuit sent more offenders to detention centers than other circuits. She commented that some of these alternative programs are located in the area. Circuit 14 (Henrico) has a larger percentage of offenders deemed higher risk who had still received an alternative. The majority of these offenders were sentenced to work release and probation. Circuit 22 (Danville, Pittsylvania and Franklin) had a large number of their cases deemed to be higher risk that were placed in the jail farm. The jail farm, Ms. Jones noted, is located in the town of Danville and is not really a farm. Judge Bach asked Ms. Jones if work release is being counted if the judge cites it on the work sheet. Ms. Jones said that the staff looks closely at the court record to discern this but it is complicated by the fact that the sheriff often makes the decision on work release. She observed that the Commission staff does not have the resources to follow up on these offenders. Judge Honts said that in his court, he usually doesn't oppose work release if the offender is qualified but he does have the right to refuse an offender this option. Ms. Jones said that the analysis presumed that if a jail farm sanction was considered an alternative then work release would seemed to fall in the same category. Judge Bach commented that he thinks there is a difference between a statement specifically ordering an offender to be on work release and one that simply does not object to the sheriff placing an offender in the program. Ms. Jones said that a lot of offenders are ordered into work release, but she wondered if that was legally binding. Judge Johnston said that judges authorized work release but they do not know if the sheriff allows the offender to participate. He said that 90% of the time, the sheriff makes the final decision if an offender is accepted into the program. Ms. Jones asked Judge Johnston if the offender usually goes into the work release program. Judge Johnston said he doesn't know and that is the sheriff's call.

Dr. Kern said the decision should be left to the Commission if they want to consider work release an alternative. Judge Honts asked why work release would be considered an alternative sanction. Ms. Jones responded that if the offender on work release was being treated substantively different than other jailed inmates than it could be argued that it was an alternative to traditional jail. She acknowledged, however, that this is a difficult judgement call. Mr. Ferguson commented that he felt work release and serving a sentence on weekends could be viewed by some as alternatives. Judge McGlothlin stated that work release and weekend sentences are totally different types of sanctions. He asserted, however, that these sentences were much more lenient treatment than a straight jail term. Most defendants, he thought, would prefer work release or weekend sentences. Mr. Ferguson suggested that the Commission define this option very carefully. Mr.Vassar

offered his perspective that work release should be considered an alternative to straight jail time.

Ms. Jones continued her presentation by discussing possible reasons that are related to selection of alternative sanction. Proximity of the programs may relate to the type of alternative chosen.

She then showed a chart that look at the use of DOC intermediate sanctions. These intermediate sanctions (Diversion centers, Detention centers and Boot Camp) comprised 21% of the alternatives imposed in the pilot sites. Circuit 5 (Suffolk) used detention center incarceration more often than the other alternatives. The detention center facility is nearby. Circuit 14 (Henrico) used detention center and boot camp incarceration more often. These facilities are approximately seventy miles away. Circuit 19 (Fairfax) sentenced more offenders to diversion center than any other alternative. The results in Circuit 22 (Danville, Franklin, Pittsylvania) are primarily driven by Franklin County. Most of the offenders are sentenced to detention center, which is a good distance away. The judges in Circuit 22 often use the programs in combination with each other. Judge McGlothlin said that a detention center is located in Russell County. Mr. Ferguson asked if the Department of Corrections was comfortable with judges sentencing offenders to a combination of programs. One judge on the Commission said DOC has approved of this type of sentence. With no further questions, Ms. Jones concluded her presentation.

The work release topic was bought up again. Judge McGlothian expressed surprise that in some jurisdictions the sheriffs were placing offenders in this program. He noted that in his circuit only the judge could put an offender in a work release program. Judge Gates asked about the statute that pertained to work release and suggested that the staff read that section of the Code and report back to the Commission.

Judge Gates thanked Ms. Jones for her presentation and then asked Ms. Farrar-Owens to discuss the next item on the agenda, Proposed Methodology for Sex Offenders Risk Assessment Study.

## Proposed Methodology for Sex Offenders Risk Assessment Study

Ms. Farrar-Owens started her presentation by saying that Senate Joint Resolution No. 333 requested the Sentencing Commission to develop a risk assessment instrument for sex offenders. This instrument is due to the General Assembly in January 2000. She noted that this is a fairly short time frame. The study itself will examine recidivism among sex offenders to assess the relative risk of re-offending. The objective is to determine those offense and offenders characteristics associated with re-offending behavior.

She said that in early March the staff began an intensive review of other studies that have been done on recidivism among sex offenders. The staff reviewed over 70 studies. Ms. Farrar-Owens then proposed the methodology that consisted of six steps. The six steps were: selecting a sentencing cohort, matching the sentencing cohort to a release cohort, determining the follow-up period, collecting offender and case information, collecting recidivism information and analyzing the data. The first step is to select a sentencing cohort. A sex offender risk assessment instrument will be applied to offenders convicted of a rape or sexual assault offense from a recent three-year cohort of rape and sex offenders sentenced in circuit court. The sample will be drawn from PSI data (CY1995-1997 or FY1996-1998) for offenders convicted and sentenced for a rape or sexual assault whether as the primary offense or an additional offense.

The staff recommended that the study exclude misdemeanor sex offenses, adultery and fornication crimes that do not involve incest, bestiality, bigamy and cohabitation offenses, and all but one of the prostitution felonies. She also recommended that the study should exclude non-forcible sodomy between adults when there is no injury. Female offenders were excluded from most of the studies reviewed. Once the proposed excluded offenses listed have been eliminated from consideration, female offenders account for 1.5% of the cases. Female offenders can be excluded from the study or they can be left in with little or no effect on the results. Either way, the instrument that is developed likely will not accurately reflect the probability or risk of recidivism for the female offender. With these exclusions, there were approximately 2,200 cases of rape and sexual assault in the PSI database for CY 1995-1997. Mr. Ferguson asked if the intent was to leave out misdemeanor sex offenses. Ms. Farrar-Owens said that the primary or initial offense must be a felony but the follow-up offenses can be misdemeanors. Mr. Ferguson commented that the Crime Commission task force has looked at civil commitment matters and one issue discussed was a sexual predator who might have a string of misdemeanor offenses before committing his first felony sex offense. He said that Virginia now has a law that convicts an offender of a felony with a third offense conviction of a sexual misdemeanor offense. Ms. Farrar-Owens said that the study would deal with Circuit Court cases only and would capture such a crime when it was treated as a felony.

The staff recommended that a simple random sample be used. Ms. Farrar-Owens stated that stratification of the sample was also explored. Stratification is a special way to draw a sample. The data is divided into groups and sample cases are drawn from the different groups. Stratification is often applied when the factor by which the data are grouped is believed to be related to the phenomenon being measured.

Although the staff considered stratifying the sample by different factors, it is believed that any groupings or classifications are best developed through analysis of the data. The staff felt that the groupings should be made based on analysis of recidivism data not based on some a priori decision made before the data collection. She recommended a minimum sample size of 500. For most studies a sample size of 400 is adequate to achieve the level

of statistical confidence we are looking for. Sampling 100 extra cases allows for missing information. Accordingly, the staff recommended that a larger sample size should be used.

Sample size selection must also include some discussion on the relative frequency of the factor being studied which, in this case, is sex offender recidivism. Based on the scientific literature, the amount of sex offender recidivism ranges widely depending on the sources of the sample and recidivism measure used (new arrest vs. new conviction, person crime recidivism vs. sex offense recidivism). In terms of sampling, a concern for this type of study is a phenomenon known as the low base rate problem. When the condition of interest is considered to be a relatively rare event, such as the commission of another sex offense, the research methodology must anticipate the possibility that a particular design may not yield a sufficient number of cases for study. Depending on the measure of recidivism selected, a sample of studied sex offenders may not produce a sufficient number of failures (recidivists) to support valid statistical conclusions. Ms. Farrar-Owens said that based on the studies reviewed, the staff suggested using a new arrest for a person crime or a new arrest for a sex offense as the measure of recidivism for this study.

If the study used arrest for a new sex offense as the recidivism measure, the staff felt that a sample of 600 cases would be needed to achieve the desired level of statistical confidence. This proposed sample size accounts for an attrition of approximately 100 of these cases due to missing file information. If the criterion for failure in the study was reconviction for a sex offense, the sample size required for the same level of statistical confidence would rise significantly because reconviction for a sex offense is a rarer event than a new re-arrest for a sex offense. A manageable sample size is vital given resource and time constraints of the study and the amount of data collection and coding that will be necessary. The results of the study are due to the 2000 General Assembly and the Commission has not been given any additional resources to conduct the study. She added that when the Commission developed the risk assessment instrument for fraud, larceny and drug offenders, we hired interns to do the coding of information from the offender files. Ms. Farrar-Owens added that given the potential complexities of rape and sexual assault cases, she thought it best that staff members, not student interns, be responsible for the coding of information for analysis.

She stressed that the sample size should be manageable to allow staff to do a thorough examination of each case for information that may be related to recidivism but large enough to provide for certain level of statistical confidence.

Ms. Farrar-Owens then discussed Step Two, which is matching the sentencing cohort to a release cohort. Once the sample of sentenced rape and sex assault offenders has been selected, the next step is to carefully match the cases in the sample to similar cases of offenders released from incarceration or given probation during an earlier period. It is the offenders from the earlier period who will be tracked for recidivism.

She said that the staff recommended using FY1990-1993 releases from prison and jail and cases of offenders sentenced to probation/no incarceration in those years. Jail and probation cases will be selected from the PSI database. Prison releases will be selected from Department of Correction's files of inmates released for rape and sex offenses. The release database will represent all rape and sex offenders who became eligible to re-offend during FY1990-1993 whether they were released from prison or jail or given a probation term. When the release database is prepared, cases in the study (sentencing cohort) sample will be matched to similar cases in the release cohort based on several key factors, such as sentencing guidelines scoring and PSI variables, to obtain as close a match as possible. Ms. Farrar-Owens stressed that because of the significant changes in sentencing laws since the period of the release cohort, length of sentence and time served cannot be used to match the offenders in the study sample from a recent sentencing cohort to the release cohort. The amount of time served can be controlled for in the data analysis stage. The staff's approach is to match the study sample to cases in the release cohort based on case characteristics. Some of the offenders in the sample study with long sentences will serve long prison terms. Offenders with long lengths of stay need to be carefully matched so that the sample is not biased in favor of those serving shorter periods of incarceration.

Ms. Farrar-Owens then discussed Step Three, which is determining the follow-up period. Whereas a three-year follow-up may be adequate to measure recidivism defined as any new offense, studies suggest that if one is attempting to measure sex offense recidivism, a longer follow-up period is needed because of the slow and gradual nature of this recidivism type. She spoke about two studies that had a twenty-five year follow-up. The research showed that the longer the follow-up period, the higher percent of reconviction rate. This led researchers to conclude that even when adopting a five year period, slightly under two thirds (63%) of new sexual charges for child molesters and half (51%) of new sexual charges for rapists would be missed.

Ms. Farrar-Owens said that a cursory look at PSI data suggests that for some types of cases, there is a significant time gap between the date of offense and the arrest, conviction, and sentencing for the crime. Therefore, if the Commission chose to use reconviction as the measure of recidivism, we may not catch some recidivism because reconviction occurs so long after the offense itself. Given the insight provided by these and other studies, the staff recommended a follow-up that is as long as possible. If the study used a FY1990-1993 release cohort, we would be able to track a portion of the released offenders for eight to nine years.

Ms. Bruce asked if the staff was going to follow the offenders for five years or nine. Ms. Farrar-Owens explained that for offenders released in 1993 the follow-up would be five years but if the offenders were released in 1990 the follow-up would be nine years. She questioned if that was methodologically sound because some offenders would have a

longer time to re-offend. Ms. Farrar-Owens said that one of the staff's approaches actually controls for that issue in the analysis phase.

Ms. Farrar-Owens then continued by presenting Step Four, which is collecting offender and case information. In order to have as much information as possible on the cases in the study sample, more detailed information will have to be collected than what is available on the automated PSI. She told the Commission members that the staff had studied more than 70 articles related to sex offender recidivism. The studies varied considerably according to the measure of recidivism, the size and source of the sample and the duration of the follow-up period. She then presented a chart that showed a list of variables that may prove to be useful in this study. Some of the variables listed were type of offender, same sex victim, weapon use, unemployment, never married, offender age, and family dysfunction. Mr. Ferguson asked if she was considering using treatment efforts as a factor. Ms. Farrar-Owens said that some of the reviewed studies did compare offenders that received treatment with those who did not, but the research showed mixed results without any solid conclusions. She said that treatment is very hard to measure and trying to find the data is also very challenging. Mr. Ferguson felt that the treatment efforts as a factor would be very important to the group that has initiated this study. He asked if the study would include probation and parole revocations as a subsequent arrest or offense. He noted that Newport News has a really good program. The city has an intensive supervision program for sex a offender that puts certain constraints or conditions on their probation. When an offender breaks his conditions of release, the offense will result in a probation revocation. This offense will not show as a subsequent offense but a behavior problem. He questioned how such a behavior problem would be accounted for in the proposed study methodology. Ms. Farrar-Owens responded that this would be a technical revocation and could pose a potential measurement problem. Judge McGlothlin asked if the study would count an arrest on a probation violation the same as an arrest on a warrant. Ms. Farrar-Owens said that these types of questions were still not resolved but would be worked out prior to initiating the study. Ms. Bruce asked if the study was going to analyze age as a factor. Ms. Farrar-Owens responded affirmatively and noted that age is currently being used in the Commission's existing risk assessment pilot study. She also observed that some studies on sex offenders had found age to be a significant factor in predicting the likelihood of recidivism.

Reverend Ricketts questioned if the measure for recidivism should be conviction rather than arrest. Ms. Farrar-Owens said that the staff's recommendation is to use arrest for certain types of person crimes. She stressed that the scientific literature on this subject supported the choice of arrests as the recidivism criterion rather than conviction. She noted that it is an important decision in the methodology since it affects the size of the sample to be taken. Reverend Ricketts felt that using arrest instead of conviction would result in offenders being counted as re-offending when some of them may have been found innocent. Ms. Farrar Owens indicated that the next step of the methodology would cover this matter in more detail.

Mr. Vasssar questioned if the staff sought grant funding in this groundbreaking research. Dr. Kern said that the General Assembly gave the Commission a short time frame to complete this work. The National Institute of Justice accepts grant applications in June and the money would be awarded in the spring 2000. The study must be complete by December 1999. Mr. Vassar commented that the Commission should look at other organizations that may fund this research. Dr. Kern felt that the staff could complete this job without resources being an issue.

Ms. Farrar-Owens then presented Step Five, which is collecting recidivism information. A very important decision in the study is the selection of the recidivism measure. The literature reviewed for this study encompassed studies that employed a variety of measures of recidivism ranging from new arrest, new person crime arrest, new sex offense arrest, new conviction, new person crime conviction, new sex offense conviction and even reincarceration.

Several studies found that measuring recidivism based on a new person crime offense, and not just a new sex offense, was important and particularly so for rapists (less of an issue for offenders classified as child molesters). Therefore, the Commission may want to measure not just a new sex offense but also any new person crime. She said that several authors stressed that due to things such as charge bargaining, charge reduction, evidence and witness problems related to sex offenses, and lack of reporting of sex offenses, that some offenders are never convicted of new sex crimes which actually occurred. These authors also document that the time between offense and conviction can be quite lengthy in many sex offender cases. Based on the great weight of the scientific literature on this subject, Ms. Farrar Owens reported that the staff recommends using arrest for a new person crime or new sex offense as the recidivism measure.

Mr. Vassar asked if there was any data on the connection between arrests and convictions in these cases. Ms. Farrar-Owens said some studies did look at that issue and that the conclusions varied. One study in Minnesota used arrests because most of their arrests did lead to a conviction. Another research study found that half of the arrested rapists were not convicted. Reverend Ricketts said he had a problem with using only arrest as the measure. He commented that he would feel more comfortable with using reconviction as well as arrest. With the State Police Sex Offender Registry on the Internet, he felt that some people are more likely to be arrested initially and then found innocent during the investigation phase. Ms. Farrar-Owens said there is definitely some trade-offs across the choices for the recidivism measure. Judge Gates asked if the study could include new conviction as well as arrest without damaging the final result. Ms. Farrar Owens responded that both measures could be used but the consequence would be the need to increase the sample size of the study and possibly the time in which to complete the study. Judge Honts asked if the study would exclude all misdemeanors. She said the study would exclude misdemeanors only for the initial offense but that all crimes would

be considered when examining recidivism. Judge Stewart asked which measure of recidivism would give the Commission the best and most accurate results for this study. Judge Stewart said that it appeared that the General Assembly was focusing on the likelihood of a new sex offense and not the broader perspective of another person crime. Dr. Kern commented that the danger in choosing a recidivism measure that excludes other person crimes is that the sex offender who recidivates by committing a murder would be considered a success. Ms. Bruce remarked that in choosing a recidivism measure that it would be wiser to err on the side of public safety and be conservative. She felt that the Commission should adopt the new person arrests standard regardless of the disposition on these cases. She acknowledged that there are numerous reasons why sex offenders have their charges dropped or dismissed and that these reasons have nothing to do with the offender's innocence. She felt that the study would benefit by analyzing these offenders. Judge Bach asked what would happen if the study used any new felony conviction of any kind. Ms. Farrar-Owens said that the staff did not draw up a scenario specifically for this contingency.

Mr. Ferguson reminded everyone that the purpose of the study resolution is to provide the judges with a risk assessment instrument to help evaluate a convicted sex offender for an appropriate sentence. He said the instrument would hopefully give judges an idea if an offender is likely to re-offend. However, he remarked that, like the sentencing guidelines, the risk assessment instrument would be discretionary and that the judge would not be bound by its recommendation. Mr. Ferguson said that as a prior prosecutor, he felt that an accurate read of an offender is his prior arrests and not convictions. He said that there are probably a much larger number of offenders who actually committed a crime and who were not convicted than those arrested who did not commit any crime. Mr. Ferguson said that he favors adopting a recidivism measure of any new arrests for a person or sex crime. He agreed with the staff's recommendation of using arrests for the measure.

Judge Gates asked the Commission to vote on the staff's recommendation. A motion to approve the use of new person arrests as the recidivism measure was made and seconded and the motion was approved.

The last step in the proposed study methodology concerns the data analysis. Ms. Farrar Owens proposed three different methods for this step of the study. The use of three different methods could help the staff identify the best model to measure the relative risk of recidivism for sex offenders and those factors most associated with recidivism. These methods are the same three methods that were used to analyze the data for the existing risk assessment instrument for fraud, larceny and drug offenders. Using the variables that are determined to be statistically significant in predicting recidivism, an analysis can be performed to develop factor scores for a risk assessment instrument. She concluded by saying that this project is going to be complex. The purpose is to investigate whether a risk assessment instrument for sex offenders is feasible. It is an empirical question that the study will put to the test.

Judge Johnston questioned whether the staff could complete this study by December of 1999. Ms. Farrar Owens responded by displaying a proposed work plan. The data analysis, which is the last stage of the project, would be completed by October 31, 1999. Mr. Vassar asked if the study was going to produce an instrument or a study report by December. Dr. Kern said that the desire is to include an instrument as part of the report with a recommendation from the Commission on what to do with it. He warned, however, that our results might contain an instrument that is judged to be not pragmatically useful. Dr. Kern remarked that just because a research finding is statistically significant does not automatically mean that the finding is substantively useful or important. Dr. Kern also pointed out that whereas the current risk assessment benefits offenders who otherwise would be incarcerated, the sex offender instrument would likely have the opposite effect. If the sex offender instrument is to be used in this fashion, he said it would not be surprising if the instrument is challenged in court. Mr. Ferguson offered the perspective that if the Commission is uneasy about the study results that the General Assembly might provide another year to work on the study. Reverend Ricketts agreed with Mr. Ferguson that the General Assembly would probably do this.

Judge Gates asked the Commission to vote on the staff's recommendation for the entire methodology to study sex offenders. A motion to accept the methodology as proposed was made and seconded and the motion was approved.

Judge Gates next asked Mr. Fridley and Ms. Smith Mason to cover the next item on the agenda, New Edition Sentencing Guidelines Manual & Training on Revision

**New Edition Sentencing Guidelines Manual & Training on Revision**

Ms. Mason began by saying that the staff is working on the new manual, which incorporates the Commission's recommendations. She said that the plan was to have the new worksheets by May 12th and the manual by June 2nd. Ms. Smith Mason said the worksheets and manuals would be sent to the judges, public defenders, probation officers and Commonwealth's attorneys at no charge. She then described the changes for the new manuals. The old manual costs $58.50 and the staff is hoping that the price will stay around the same amount. Defense attorneys paid for the manual to help offset our cost of printing. A What's New section will be in the manual to detail all the changes that are occurring July 1, 1999. She then gave the members a schedule of training for the new manual. Ms. Smith Mason then turned the presentation over to Mr. Fridley.

Mr. Fridley discussed the new edition of the manual. During the process of updating the manual several issues arose that need to be addressed. The General Assembly passed a new law in the last session called Virginia Exile. This law creates a mandatory minimum

for any convicted felon that possesses a firearm. The felon will received a five-year sentence if he has a violent record and a two-year sentence for a non-violent record. Mr. Fridley then presented a current Miscellaneous worksheet and proposed adding a new factor to account for this new law. The new factor would ensure that the offender would go to Section C of the Sentencing Guidelines. The factor would add 6 points for mandatory firearm conviction for current event. The offender would get two points for the primary offense and an additional six points for the firearm charge plus any prior record points so the guidelines recommendation would be a prison sentence. Mr. Fridley asked for the Commission's approval of this recommendation.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted in favor of the recommendation.

Mr. Fridley continued by saying that the next issue dealt with legal restraint. He asked the Commission to make a ruling on whether an offender is to be considered legally restrained if he commits a new law violation and still owes court costs, fines and restitution. Mr. Ferguson said that overdue or unpaid fines, court costs and restitution should **NOT** be counted as legal restraint. Judge Stewart concurred and recommended that they not be considered legal restraint. A motion to adopt this recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted in favor of the recommendation that unpaid fines, court costs and restitution not be considered legal restraint.

Judge Gates next asked Dr. Kern to cover a number of miscellaneous items left on the agenda.

### Miscellaneous Items

Dr. Kern asked the members if anyone was interested in attending the National Association of Sentencing Commission in Salt Lake City. A brochure for this conference was enclosed in the packets of each member. Judge Gates told the members to call Dr. Kern if they are interested in attending the conference in August.

With no further business, Judge Gates reminded everyone that the next Sentencing Commission meeting is June 7, 1999, in the 3rd floor judicial conference room. The last two Commission meetings schedule for 1999 are September 13th and November 8th.

With no further business on the agenda, the Commission adjourned at 1:50 p.m.